United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1397

To be submitted

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1397

UNITED STATES OF AMERICA,

Appellee,

—v.—

CHARLES BUSIGO CIFRE,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
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Preliminary Statement

Charles Busigo Cifre appeals from an order entered in the United States District Court for the Southern District of New York on July 30, 1976, by the Honorable Charles M. Metzner, United States District Judge, denying his motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure to correct an allegedly illegal sentence.

Statement of Facts

Indictment 74 Cr. 18, filed January 9, 1974, in Count One charged Cifre, twenty-one other defendants, and two additional co-conspirators with conspiracy to traffic in narcotics in violation of Title 21, United States Code,

Sections 173 and 174,* in Count Five charged Cifre with buying a total of one kilogram of heroin in March and/or April, 1970, in violation of Title 21, United States Code, Section 174, and in the remaining counts charged defendants other than Cifre with one or more substantive offenses in violation of Title 21, United States Code, Sections 173 and 174. Hence, the entire indictment was based on the law as it stood before Sections 173 and 174 were repealed by the Comprehensive Drug Abuse Prevention and Control Act of 1970, Public Law 91-513, 84 Stat. 1292.**

On February 15, 1974, five days before trial, a Second Offender Information was filed against Cifre charging that he had previously been convicted in June, 1955, of narcotics charges filed in the District Court of Puerto Rico. Trial commenced on February 20, 1974, and concluded against Cifre on March 20, 1974, when he was found guilty on Count One, and acquitted on Count Five. The next day, March 21, 1974, Judge Metzner filed an order informing Cifre and a co-defendant that they each faced mandatory minimum sentences of 10 years as second offenders.

On April 30, 1974, Cifre was sentenced to ten years. At the outset of the sentence hearing held on that day, the court clerk had read the relevant portions of the Second Offender Information to Cifre, inquired whether the defendant understood that Information, and ascer-

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* Prior to trial the Government moved to withdraw paragraph 4 of Count One, charging conspiracy to distribute narcotics not in or from the original stamped package in violation of Title 26, United States Code, Sections 4701, 4703, 7404(a) and 7237(a), and it was stricken by order of Judge Metzner on January 22, 1974.

** While the indictment was filed after the new drug law was enacted, the acts upon which it was based had occurred before the effective date of the new statute.

tained from the defendant himself that he had pleaded guilty to the narcotics charges in Puerto Rico (S. Tr. 2-3).* This dialogue** took place on the record in open court. Cifre's lawyer was subsequently asked if she had anything to say before Cifre was sentenced (S Tr. 3), and thus at that time, had the opportunity to protest the Second Offender Information had she or the defendant thought that the prior conviction was invalid or that Cifre had not been the defendant in the prior matter. However, counsel made no such protest, nor did Cifre, who was also given an opportunity to address the court. In sentencing Cifre to ten years, Judge Metzner expressly stated that he was doing so because that was the mandatory minimum sentence which the law obliged him to impose (S. Tr. 9). The defense did not challenge that analysis, although it could only have been correct if Cifre was in fact a second offender. Indeed, it was only in connection with Judge Metzner's refusal to set bail pending appeal that defense counsel in any way protested the use of the narcotics convictions which had taken place 19 years before (S. Tr. 12-13).

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* Hereinafter, "S. Tr." refers to page numbers in the transcript of the April 30, 1974, sentencing of Cifre.

** The Clerk: Mr. Cifre, I have an information here that states that Paul Curran, the United States Attorney for the Southern District of New York, accuses the defendant named above, also named in Indictment 74 Cr. 18, of having been previously convicted as hereinbelow described; that the defendant on or about the 9th day of June, 1955 in the Southern District of Puerto Rico, was duly convicted of conspiring to receive, conceal, and facilitate the transportation of narcotic drugs in violation of Title 21, United States Code, Sections 171, 173 and 174.

Mr. Cifre, did you understand the charges I read to you?

Mr. Cifre: Yes, sir.

The Clerk: How do you plead?

Mr. Cifre: I did plead guilty to them.

The Clerk: He admits, your Honor. (S. Tr. 2-3).

After sentencing, Cifre appealed and his conviction was affirmed *per curiam* by this Court on November 8, 1974. 506 F.2d 455. His petition for a writ of certiorari was denied by the Supreme Court on April 14, 1975. 421 U.S. 910.

On June 10, 1976, after twice making and having been denied motions to reduce sentence, Cifre filed a motion to correct an allegedly illegal sentence pursuant to Rule 35 of the Federal Rules of Criminal Procedure. By endorsement dated July 30, 1976, Judge Metzner denied the motion. This appeal followed. Cifre is presently serving his sentence.

ARGUMENT

POINT I

The allocution on the Second Offender Information was sufficient.

Cifre's contention that Judge Metzner, rather than the court clerk, should have made the inquiry regarding whether Cifre was indeed convicted of a prior narcotics offense in 1955 as charged in the Second Offender Information is without merit. To the contrary, the statutory requirements were met.

Because, as this Court has previously recognized (*United States* v. *Ortega-Alvarez*, 506 F.2d 455, 456 (2d Cir. 1974), *cert. denied*, 421 U.S. 910 (1975)), this is an "old law" case prosecuted solely under the former provisions of 21 U.S.C. 173 and 174, the Second Offender Procedures are governed by what was formerly 26 U.S.C. 7237(c)(2).* See *Bradley* v. *United States*,

* 26 U.S.C. 7237(c)(2) was repealed at the same time as 21 U.S.C. 173 and 174, by Section 1101(b) the Comprehensive Drug Abuse Prevention and Control Act of 1970. 21 U.S.C. 851(b) substituted new procedures for those formerly prescribed by 26 U.S.C. 7237 (c)(2).

410 U.S. 605 (1973); *United States* v. *Kella*, 490 F.2d 1095 (2d Cir. 1974) (per curiam); Comprehensive Drug Abuse Prevention and Control Act of 1970, § 1103(a), 21 U.S.C. § 171 note (savings clause). All that Section 7237(c)(2) required was that after the United States Attorney had filed an information setting forth the defendant's prior narcotics convictions, the defendant was to "have the *opportunity* in open court to affirm or deny that he is identical with the person previously convicted" 21 U.S.C. § 7237(c)(2) (emphasis added). There is no specification of the way in which that opportunity is to be provided. Inasmuch as here the defendant was afforded, and took, the opportunity to admit he had in fact pled guilty to the 1955 offense, and therefore was the same person previously convicted, the statutory requirements were more than satisfied.

Nothing in the statute prescribes whether it is to be the judge or the court clerk who actually asks the questions, and in fact no specific inquiry need be made, as long as the defendant has the opportunity to deny the prior convictions. See *United States* v. *Scales*, 249 F.2d 368 (7th Cir. 1957), *cert. denied*, 356 U.S. 945 (1958). Nor is an overly technical construction of requirements of 7237(c)(1) warranted. Rather, this Court has been satisfied with substantial compliance which accomplices the statutory objective of protecting "a defendant from the effect of prior offenses incorrectly charged." *United States* v. *Duhart*, 269 F.2d 113, 116 (2d Cir. 1959). Since Cifre makes no claim that he was not convicted of a narcotics offense in 1955, and in fact admitted the same at sentencing, the statutory purpose was undeniably served.

Defendant's reliance on *United States* v. *Garcia*, 526 F.2d 958 (5th Cir. 1976) and *United States* v. *Noland*, 495 F.2d 529 (5th Cir.), *cert. denied*, 419 U.S. 966 (1974) is misplaced. *Garcia* and *Noland* construe a

different statute, namely 21 U.S.C. 851(b), which replaced 26 U.S.C. 7237(c)(2) in 1970 and which does not govern Cifre's conviction. Unlike 7237(c)(2), which did not specify how the defendant was to be afforded the "opportunity" to deny the prior conviction, 21 U.S.C. 851(b) specifically requires that an inquiry be addressed to the defendant, and that the court also inform him that "any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence". All *Garcia* and *Noland* do is require that where 21 U.S.C. 851(b) governs the procedure, the statutory mandate be followed. Since Cifre's sentencing was governed not by that statute but by the old law, those cases are wholly inapposite.

Nor should the procedures explicitly required by Section 851 be read into 26 U.S.C. 7237. Section 7237 was itself a deliberate departure from the explicit procedures mandated by a prior provision. *See United States* v. *Kapsalis*, 214 F.2d 677, 685 (7th Cir. 1954), *cert. denied*, 349 U.S. 906 (1955). The development of the "substantial compliance" doctrine reflected that no particular ritual was required by Section 7237. See *United States* v. *Duhart*, *supra*; *Good* v. *United States*, 410 F.2d 1217, 1221-22 (5th Cir. 1969), *cert. denied*, 397 U.S. 1002 (1970); *United States* v. *Knight*, 225 F.2d 55 (9th Cir.), *cert. denied*, 350 U.S. 890 (1955).

POINT II

Cifre's prior narcotics conviction properly required the imposition of an enhanced mandatory minimum sentence.

Cifre's contention that his prior conviction was too distant to have required the enhanced sentence provisions for second offenders is erroneous. The statute requiring such increased sentence provided simply that for "a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954)", an enhanced sentence was mandated. 21 U.S.C. § 174. No time limit was provided in Section 174, and none in 26 U.S.C. 7237(c), which simply listed the offenses which would activate the Section 174 provision. Nor is there any reason to believe that Congress intended that offenses which were committed years before should be disregarded. To the contrary, when Section 174 was amended in 1956 to increase the penalties to those to which Cifre was subject, the Conference Report condemned repeat offenders in the strongest terms:

> In addition to effectively deterring the entrance of hoodlum recruits into the field of illicit trafficking, it is necessary that the violator with a record of prior drug offenses be dealt with in a most severe manner. There are few criminal acts that are more reprehensible than the act of abetting drug addiction by engaging in the illicit narcotic and marihuana traffic. Prior to the enactment of the Boggs law in the 82d Congress, Federal enforcement officers found that by the time a gang of drug violators was apprehended, the case processed through the courts, and the violators sentenced, a previous gang that had gone through the same procedure was out of prison and had returned to the illicit drug traffic. Conference Report No. 2546, 1956 U.S. Code Cong. & Adm. News 3274, 3285.

Certainly, the enhanced sentence provisions have been applied in circumstances in which the prior conviction was nearly as old as in the present case. *See*, e.g., *Beland* v. *United States*, 128 F.2d 795 (5th Cir.), *cert. denied*, 317 U.S. 676 (1942) (15 year old predicate conviction); *Abbamonte* v. *United States*, 335 F. Supp. 1180, 1183 (S.D.N.Y. 1972) (10 year and 16 year old predicate convictions). *Cf. Green* v. *Peyton*, 262 F. Supp. 726 (W.D. Va., 1966) (approving use of 18 year old conviction under State of Virginia's "two time felon" law). Defendant cites no authority to support his theory that the use of the distant prior conviction violates due process. While counsel for the government knows of no case where the use of a distant conviction is explicitly approved as not violative of due process, in *Beland*, *supra*, the court voiced no due process objection to the age of the 15 year old predicate conviction although it considered other constitutional challenges to the sentence.

Nor does the holding or logic of *United States* v. *Puco*, 453 F.2d 539 (2d Cir. 1971), require that the 19 year old conviction be disregarded for sentencing purposes.* All *Puco* holds is that under the balancing test, a 20 year old prior conviction for the same offense should not be used to impeach credibility since a narcotics conviction has little necessary relationship to credibility, and the chance of unfair prejudice in the jury's mind is great where the offense is the same. *Cf.* F.R. Evid. 609

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* All that is before this Court is the use of the conviction to call the enhanced sentencing provisions into effect. While Cifre apparently protests what he phrases as the Government's "intention" to cross-examine on the basis of the prior conviction had defendant elected to take the stand, the propriety of that proposed use of the conviction is not, and could not be, a subject of the present Rule 35 motion.

(b)[1]. As Judge Metzner put it, *Puco* "speaks only of the staleness of a prior conviction which the government is using for impeachment purposes. It has nothing to do with the invalidity of such a prior sentence insofar as an enhanced sentence is concerned." Memorandum Endorsement, July 30, 1976. While a prior narcotics conviction may have little necessary relationship to credibility, it has great significance in determining whether the defendant is in that class of repeat offenders with whom Congress intended to deal stringently. Thus the *Puco* rationale has no application here.

CONCLUSION

The order of the District Court should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Thea Kemble Navarro being duly sworn, deposes and says that she is employed in the office of the United States Attorney for the Southern District of New York.

That on the 22nd day of February, 1977, she served ~~a copy~~ Exhibits of the within brief by placing the same in a properly postpaid franked envelope addressed:

Charles Bruzzo-Citro
Appellant/Defendant Pro Se
United States Penitentiary
Box MMB 795-69-158
Atlanta, Georgia 30315

And deponent further says that she sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Thea Kemble Navarro

Sworn to before me this
22nd day of February, 1977
Jane Parner

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No. 41-0928323
Qualified in New York County
Commission Expires March 30, 1978